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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. [redacted] 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., a corporation, Claimant of the Steamship "Taigen Maru," etc.

Respondent.

Respondent's Motion for Order to Print Complete Transcript of Record and Supporting Affidavit

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LANE SUMMERS,
Proctor for Respondent.

Of Counsel:

W. H. HAYDEN,
F. T. MERRITT,
G. H. BUCEY,
Central Building, Seattle, Washington.



MAIN 2279
94 Spring Street
SEATTLE, WN.

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Comes now respondent, Ocean Transport Company, Ltd., a corporation, as claimant of the steamship "Taigen Maru," and moves for an order of this Court requiring and directing the printing of that portion of the typewritten transcript of record now on file with

the clerk of this Court (submitted to and considered by both lower Courts in the above entitled cause) never heretofore printed, as the result of inadvertent omission by the Clerk of the appellate court in originally failing to transmit the same to the Clerk of this Court with that portion of the transcript of record heretofore printed, pursuant to order of this Court, upon motion of petitioner as a seaman under United States Code Annotated, Title 28, Section 837.

This motion is based upon the full typewritten transcript of record filed with the Clerk of this Court, and upon supporting explanatory affidavit hereto attached as a part hereof.

LANE SUMMERS,
Proctor for Respondent.

Of Counsel:

W. H. HAYDEN,
F. T. MERRITT,
G. H. BUCEY,
Central Building,
Seattle, Washington.

UNITED STATES OF AMERICA)
STATE OF WASHINGTON) ss.
COUNTY OF KING)

LANE SUMMERS, being first duly sworn, upon oath deposes and says:

That this affidavit is made in support of the foregoing motion.

That affiant is one of the proctors of record for the respondent Ocean Transport Company, Ltd., a Japanese corporation, claimant and owner of the steamship "Taigen Maru"; that affiant is familiar with the history of and the record in this cause.

That the pending cause is an admiralty proceeding in rem, instituted in the United States District Court for the Western District of Washington, Southern Division, by libel of petitioner, a subject of the Netherlands, against the Japanese steamship "Taigen Maru," to recover damages for personal injuries alleged to have been sustained on the high seas during employment aboard as a seaman in May, 1922.

I. That in skeleton outline the ultimate facts upon which respondent's motion is based are as follows:

(1) The transcript of record in this cause was not printed on appeal to the Circuit Court of Appeals—petitioner (appellant) being a sea-

man entitled to the benefits of U. S. C. A. Title 28, Section 837;

(2) The transcript of record in this cause included certified transcript of record in a former cause (litigated in the United States District Court for the District of Oregon) incorporated in this cause by reference and by stipulation as a part of respondent's exceptions to petitioner's libel, and likewise incorporated as a part of the Norwegian Consul's protest and exceptive allegations to said libel;

(3) The transcript of record in the former cause was an essential part of the contentions made by respondent and by the Norwegian Consul in defense against petitioner's libel;

(4) The transcript of record in the former cause was presented to both lower courts as a part of the record in this cause, and was considered by both lower courts in dismissing petitioner's libel;

(5) By inadvertent omission of the Clerk of the Circuit Court of Appeals for the Ninth Circuit the transcript of record in the former cause was not transmitted to the Clerk of this court as a part of the transcript of record in this cause;

(6) Because of such inadvertent omission the transcript of record in the former cause was not printed by the Clerk of this court pursuant to its order directing the printing of the transcript of record upon petitioner's application;

(7) The transcript of record in the former cause, duly certified, is now on file with the Clerk of this court available for printing;

(8) The transcript of record in the former cause is an essential basis for review of and right decision in this cause.

II. That in amplified statement, the facts upon which respondent's motion is based are as follows:

That petitioner first attempted to recover damages for said personal injuries by filing, in September, 1922, in the United States District Court for the District of Oregon, a libel in rem against the same steamship, then a Norwegian vessel named "Luise Nielsen." That after the seizure of said steamship under the usual admiralty process she was released by B. Stolt Nielsen & Company, Inc., a corporation of the Kingdom of Norway, as the then owner thereof, upon a release bond in the form of a stipulation.

That in April, 1924, following entry of order of court allowing intervention, the Norwegian Consul at Portland, Oregon, filed exceptive allegations to petitioner's libel, on the basis of which dismissal was sought as an exercise of the court's discretion, with permission for the adjustment of petitioner's claim by the Norwegian Consul in harmony with the laws of the Kingdom of Norway. That the Norwegian Consul's exceptive allegations alleged and showed:

(1) That the respondent vessel was of Norwegian nationality;

(2) That petitioner was a subject of the Netherlands;

(3) That under the general maritime law, being a member of the crew of a Norwegian vessel, signed under Norwegian articles, as concerned petitioner's rights and obligations, he was a Norwegian seaman;

(4) That by the Norwegian law an ill or injured seaman was to be entrusted to the Norwegian Consul for adjustment of claims and settlement of any dispute with the master or vessel;

(5) That articles signed by petitioner contained a provision that the interpretation of the rights and obligations under the contract were determinable by the Norwegian Consul and not by a foreign court;

(6) That since suffering injuries, petitioner had received hospital care at the expense of the Norwegian steamship owner and the Norwegian government.

That in May, 1924, the Norwegian steamship owner filed its answer to petitioner's libel in which, in addition to denials, it made affirmative allegations summarized as follows:

(1) That petitioner was a subject of the Netherlands;

(2) That the steamship was of Norwegian nationality;

(3) That the contract of hiring between the steamship and petitioner contained provision that "he shall serve on board the ship in the capacity of able seaman and ordinary seaman, with obligations and rights as stated in maritime law of the 20th of July, 1893. (Norwegian law)"; and that "any disagreement as to the interpretation of this contract shall be temporarily decided by the Norwegian Consul and not in a foreign country be brought in a foreign court;"

(4) That said quoted provisions of the Norwegian maritime law were applicable to the rights and obligations of petitioner and said steamship and its owner;

(5) That in addition to such provisions of the Norwegian maritime law, there was at the time of said injuries in force in Norway a Workmen's Compensation Act, known as the law of August 18, 1911, relating to the insurance of seaman against accidents, providing for compensation insurance from a state administered fund for injured Norwegian seamen, and for foreign seamen injured on Norwegian vessels, and providing that if an accident rendered it necessary to send an injured seaman to a hospital, the Royal Accident Insurance Office of Norway would make payment of the expense connected with the treatment and maintenance of such injured seaman, even

though a foreigner, without possessing or claiming any right to reimbursement from the owner of the ship upon which such injury occurred; and further providing in Section 32 of said law that "accidents coming within the scope of this law" (of which the accident to petitioner was one) "impose no obligation upon the owner, master or other officer of the ship concerned to pay personally, or out of ship's estate, any compensation, unless it has been proved by a penal sentence that one or the other of such persons has caused the injury through intent or through gross negligence";

(6) That said petitioner had theretofore received hospital care and been maintained at substantial expense.

That subsequently, in May, 1924, hearing was had before the District Court of Oregon, at which oral testimony and written depositions were received and considered upon issues presented by petitioner's libel, the exceptions thereto of the Norwegian Consul, and the answer thereto of the Norwegian steamship owner.

That in June, 1924, decree of the District Court of Oregon was entered, dismissing petitioner's libel with costs. That no appeal being taken or application for review being made to any appellate court, such decree became final.

That after a lapse of seven years following such decree, petitioner's second and present attempt to recover for the same personal injuries was made, by filing libel in rem in the above entitled cause in April, 1931, before the District Court for the Western District of Washington, against the same steamship (then the Japanese steamship "Taigen Maru"), after respondent Ocean Transport Company, Ltd., had become owner thereof.

That said steamship having previously been released under the usual bond, respondent as steamship owner, filed in December, 1932, exceptions to petitioner's libel in the present cause alleging and showing:

(1) The cause of action set forth in petitioner's first admiralty libel, filed in the District Court of Oregon;

(2) The claim to and release of the steamship upon bond filed by the Norwegian owner;

(3) The answer of such Norwegian owner to petitioner's libel;

(4) The depositions of witnesses filed in the former admiralty cause;

(5) The intervention of the Norwegian Consul in the former admiralty cause;

(6) The exceptive allegations of such Norwegian Consul;

(7) The amended libel of petitioner in the former admiralty cause;

(8) The answer of the Norwegian owner to petitioner's amended libel;

(9) The hearing before the District Court of Oregon;

(10) The final decree of that Court entered in June, 1924, dismissing petitioner's libel with costs;

(11) The fact of no appeal or review;

(12) The complete identity of petitioner, his cause of action, and the steamship, both in the former and in the present suits.

That also in December, 1932, intervention having been allowed by order of court, the Norwegian Consul at Seattle, Washington, filed exceptive allegations to petitioner's libel in the present cause, which exceptive allegations alleged and showed:

(1) That the steamship in May, 1922, was Norwegian in nationality and ownership;

(2) That petitioner was a subject of the Netherlands;

(3) That under the general maritime law, being a member of the crew of a Norwegian ship, employed under Norwegian articles, petitioner's rights and obligations as a seaman were determined by the Norwegian law;

(4) That according to the provisions of the Norwegian law disputes between a seaman and the vessel or its master were to be settled by the Norwegian Consul, and liability for illness or injury to the seaman rested upon the government treasury and not upon the owner of the vessel under the Seamen's Compensation Act of August 18, 1911 (Norwegian);

(5) That the articles signed by petitioner expressly agreed that the rights and obligations be determined by the Norwegian law, and that any dispute be decided by the Norwegian Consul and be not decided by any foreign court in any foreign country;

(6) That petitioner had received medical, nursing and hospital care in Astoria, Oregon, to the extent of approximately $2000 at the expense of the Norwegian owner and the Norwegian government;

(7) That the provisions of the Norwegian law and of the ship's articles, signed by petitioner, had been proved and established in the earlier litigation before the District Court of Oregon, as shown by the certi-

fied copy of the record transferred to the present cause on stipulation;

That in January, 1933, the District Court of Washington "concluded that in the exercise of its discretion the court should not hear said cause upon the merits" and dismissed petitioner's libel in the present cause with costs taxed against petitioner.

That the dismissal of petitioner's libel in this cause was appropriately predicated in part upon the proceedings in and the results of the former admiralty litigation, instituted by petitioner in the District Court of Oregon, which same were incorporated in and made a part of the exceptions of respondent to petitioner's libel, and the exceptive allegations of the Norwegian Consul to petitioner's libel by reference therein to the transcript of record from the District Court of Oregon. That such transcript of record, certified by the Clerk of the District Court of Oregon, was incorporated in and made a part of respondent's exceptions and the Norwegian Consul's exceptive allegations by stipulation with proctors for petitioner, filed in this cause in December, 1932.

That petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit in this cause, by notice filed in April, 1933. That in connection with such appeal order was obtained permitting petitioner to

prosecute the appeal as a seaman under the provisions of U. S. C. A. Title 28, Section 837.

That petitioner by the Circuit Court of Appeals was allowed to prosecute the appeal without printing any of the transcript of record, the appeal being determined solely upon typewritten apostles, of which respondent and affiant were furnished no copy.

That at the time application was made to this Court by petitioner for writ of certiorari there existed no printed apostles, the transcript of record being wholly in typewritten form, confined to the original on file with the Clerk of the appellate court.

That in connection with the petitioner's said application for writ of certiorari, by the inadvertence of the Clerk of the Crcuit Court of Appeals there was omitted from transmission to the Clerk of this Court a portion of the transcript of record, to-wit: the entire transcript of record from the District Court for the District of Oregon, certified by the Clerk thereof, which had been incorporated in and made a part of respondent's exceptions to petitioner's libel and the Norwegian Consul's exceptive allegations to petitioner's libel, upon which said exceptions and said exceptive allegations were predicated, and to which the District Court for the Western District of Washington, and the Circuit Court of Appeals gave con-

sideration in reaching their respective decisions dismissing petitioner's libel. That such transcript of record from the District Court of Oregon not having been received by the Clerk of this Court, the same was not included in the transcript of record as printed by the Clerk of this Court under its special order upon petitioner's application.

That upon receiving from the Clerk of this Court printed copy of transcript of record, affiant became advised of omission therefrom of the typewritten transcript of record in the former proceedings, certified by the Clerk of the District Court of Oregon. That on respondent's application, the Clerk of the Circuit Court of Appeals transmitted to the Clerk of this Court all of the transcript of record in the above entitled cause which same is now on file with the Clerk of this Court, duly certified and available for printing.

That when this cause was pending on appeal before the Circuit Court of Appeals, affirmance of the lower Court's decree of dismissal was urged by respondent's brief (pp. 20-25) upon contentions and authorities summarized and listed as follows:

> "1. Federal courts will not hear a cause on the merits in the absence of jurisdiction; and where a federal court has no jurisdiction over the subject matter, objection to jurisdiction may be

urged at any time in the trial court or in the appellate court; and even in the absence of objection, it is the duty of the court, on its own motion, to dismiss a case of which it has no jurisdiction.

1. Benedict on Admiralty, 5th Ed., Sec. 235;

Cutler v. Rae, 7 How. 730; 12 L. Ed. 890;

Mansfield, etc. Co. v. Swan, 111 U. S. 379; 28 L. Ed. 462;

Minnesota v. Northern Securities Co., 194 U. S. 48; 48 L. Ed. 870;

Chicago, etc. Co. v. Willard, 220 U. S. 413; 55 L. Ed. 521;

United States v. Mayer, 235 U. S. 55; 59 L. Ed. 129;

The Dredge Lisbon, 3 Fed. 2d 408 (C. C. A. 9);

The White Squall, Fed. Cas. 17570 (C. C.);

The Monte A., 12 Fed. 331 (D. C.);

The John C. Sweeney, 55 Fed. 540 (D. C.);

The Lindrup, 70 Fed. 718 (D. C.);

The Oceano, 148 Fed. 131 (D. C.);

The Washington, 296 Fed. 158 (D. C.);

The Amsadoc, 1923 A. M. C. 1017 (D. C.);

Crawford v. Ocean Carriers Co., 1924 A. M. C. 45 (D. C.).

"2. The Norwegian law, being the law of the ship's flag, applies to a claim of a Dutch seaman, employed under Norwegian articles, injured aboard a Norwegian vessel on the high seas; and, since under the Norwegian law no lien against the vessel exists, the court is without jurisdiction of the subject matter.

Crapo v. Kelly, 16 Wall. 610; 21 L. Ed. 430, 436;

Mali v. Keeper of Common Jail, 120 U. S. 1; 30 L. Ed. 565; 567;

In re Ross, 140 U. S. 453; 35 L. Ed. 581, 589;

United States v. Rodgers, 150 U. S. 249; 37 L. Ed. 1071, 1077;

Patterson v. The Endora, 190 U. S. 169; 47 L. Ed. 1002, 1007;

The Hamilton, 207 U. S. 398; 52 L. Ed. 264;

Grand Trunk Ry. Co. v. Wright, 21 Fed. (2d) 815 (C. C. A. 6);

The Falco, 20 Fed. (2d) 362 (C. C. A. 2);

U. S. S. B. v. Greenwald, 16 Fed. (2d) 951 (C. C. A. 2);

The Hanna Nielsen, 273 Fed. 171 (C. C. A. 2);

Rainey v. New York, etc. Co., 216 Fed. 449, 454 (C. C. A. 9);

Thompson etc. Ass'n v. McGregor, 207 Fed. 209 (C. C. A. 6);

The European, 120 Fed. 776, 780 (C. C. A. 5);

Navarino, 7 Fed. (2d) 743,744 (D. C.);

Wenzler v. The Robin Line Steamship Co., 277 Fed. 812 (D. C.);

The Cuzco. 225 Fed. 169, 175 (D. C.);

The Esther, 190 Fed. 216, 219 (D. C.);

The Belvidere, 90 Fed. 106 (D. C.);

The Welhaven, 55 Fed. 80 (D. C.);

The Marie, 49 Fed. 288 (D. C.);

The Egyptian Monarch, 36 Fed. 773, 774 (D. C.);

Wilson v. The John Ritson, 35 Fed. 663 (D. C.);

Resigno v. Jarka Co., 162 N. E. 13 (N. Y.);

Clark v. Montezuma, 1926 A. M. C. 594 (N. Y.).

"3. Even if a lien against the vessel did originally exist, nevertheless, no jurisdiction of the subject matter in this present cause was ever acquired by the lower court or by this court, because the respondent vessel was forever released from such lien by the bond or stipulation to abide and pay the decree filed in the former suit pending before the United States District Court at Portland.

Hughes on Admiralty, pp. 407, 408;

1 Corpus Juris, 1306;

1 Benedict on Admiralty, 5th Ed. Sec. 364;

United States v. Ames, 99 U. S. 35; 25 L. Ed. 295;

The Haytian Republic, 154 U. S. 118; 38 L. Ed. 930;

The Union, Fed. Cas. 14346 (C. C.);

The White Squall, Fed. Cas. 17570 (C. C.);

The Fred M. Lawrence, 94 Fed. 1017 (C. C. A. 2);

The I. F. Chapman, 241 Fed. 836 (C. C. A. 1);

The Susana, 2 Fed. (2d) 410, 412 (C. C. A. 4);

Gray v. Hopkins-Carter, etc. Co., 32 Fed (2d) 877 (C. C. A. 5);

United States v. Davidson, 50 Fed. (2d) 517 (C. C. A. 1);

The Old Concord, Fed. Cas. 10482 (D. C.);

The Josephine, Fed. Cas. 12663 (D. C.);

The Thales, Fed. Cas. 13855 (D. C.);

The Nahor, 9 Fed. 213 (D. C.);

The William F. McRae, 23 Fed. 557 (D. C.);

The Cleveland 98 Fed. 631 (D. C.);

Lamprecht, et al, v. Cleveland, etc. Co., 291 Fed. 876 (D. C.);

Re: John B. Rose Co., 254 Fed. 367 (D. C.);

The Gasconier, 8 Fed. (2d) 104 (D. C.);

The Comanche, 47 Fed. (2d) 331 (D. C.;

Welding Co. v. Gotham Marine Corp'n, 47 Fed. (2d) 332 (D. C.);

Red Star etc. Co. v. Tug Forest E. Single, 1933 A. M. C. 1488 (D. C.);

The Greyhound, 4 Fed. Sup. 184 (D. C.);

The Nightingale, 4 Fed. Sup. 494 (D. C.);

The Phantasy, 4 Fed. Sup. 920 (D. C.);

The Cayuga, 6 Fed. Sup. 280 (D. C.);

"4. Under the treaty between the Kingdom of Norway and the United States, the Norwegian Consuls are granted authority 'to sit as judges and arbitrators' to determine the claims of seamen against Norwegian vessels, and the admiralty courts of this country are bound, without exercise of discretion, to dismiss such suits in recognition of consular jurisdiction.

Treaty of Commerce and Navigation, 1827, between the United States and the Kingdom of Sweden and Norway—Article XIII, Vol. 2, Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909, pp. 1748, 1775;

The Belgenland, 114 U. S. 355, 364; 29 L. Ed. 152, 155;

Heredia v. Davies, 12 Fed. (2d) 500, 501 (C. C. A. 4);

The Marie, 49 Fed. 286 (D. C.);

The Welhaven, 55 Fed. 80 (D. C.);

The Esther, 190 Fed. 216, 221;

The Sarpfos, 1924 A. M. C. 347 (D. C.);

The Cambitsis, 14 Fed. (2d) 236 (D. C.);

26 R. C. L. pp. 925, 926.

"5. Even in the absence of treaty granting consular authority, the exercise of jurisdiction by federal courts over admiralty suits involving a claim by a foreign seaman against a foreign vessel is discretionary; such jurisdiction will not be maintained over the protest of a foreign consul, except when, in the exercise of sound discretion, it is necessary to prevent actual injustice; and the refusal to maintain jurisdiction in a particular case will not be disturbed in the appellate court except for abuse of discretion by the trial court.

Ex Parte Newman, 81 U. S. 152, 168, 169; 20 L. Ed. 877, 880;

The Belgenland, 114 U. S. 355, 368; 29 L. Ed. 152, 157;

The Falco, 20 Fed. (2d) 362 (C. C. A. 2);

The Modjokerto, 1931 A. M. C. 2006 (D. C.);

Ulrich v. North German Lloyd, 1929 A. M. C. 109 (D. C.);

The Manchurian Prince, 1928 A. M. C. 1320 (N. Y. Ap. Div.);

The Knappingsborg, 26 Fed. (2d) 935 (D. C.);

The Ferm—The Boheme, 15 Fed. (2d) 887 (D. C.);

The Heracles, 1926 A. M. C. 1231 (D. C.);
The New Texas, 1926 A. M. C. 1514 (D. C.);
The Strathlorne, 1926 A. M. C. 1384 (D. C.);
The Thorgerd, 1926 A. M. C. 404 (D. C.);
The Bifrost, 8 Fed. (2d) 361 (D. C.);
The Koenigin Luise, 184 Fed. 170 (D. C.);
The Albani, 169 Fed. 220 (D. C.)."

That transcript of record in the former cause litigated before the District Court of Oregon was material to the ruling of the Circuit Court of Appeals, made in this cause on November 19, 1934 (R. 41-46) in acceptance of respondent's fourth contention, and is essential to an affirmace of the decrees of both lower courts dismissing petitioner's libel upon respondent's second, third and fifth contentions.

That, in conclusion, unless this Court requires and directs the Clerk thereof to supplement the transcript of record as now printed by adding thereto printed transcript of record in the former cause litigated before the District Court of Oregon, certified by its Clerk, now on file with the Clerk of this Court, it will be impossible for respondent, in conformity with the rules of this Court in respect to respondent's briefs, to fully present facts essential to a just and correct determination of this cause; and respondent will be deprived of the factual basis upon which to urge contentions which

should prompt this Court to deny petitioner's application for writ of certiorari, and which should cause, in the event of a hearing upon the merits, this Court to affirm both lower courts in their dismissal of petitioner's libel.

LANE SUMMERS,

Subscribed and sworn to before me
this 25th day of October, 1935.

FRED S. MERRITT,
Notary Public in and for the State
of Washington, residing at Seattle.
(Notarial Seal)